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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MARJORIE ZICHERMAN, individually and as executrix of the estate of Muriel A.M.S. Kole, and Muriel Mahalek,

Petitioners,

—v.—

KOREAN AIR LINES CO., LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF PLAINTIFFS' COMMITTEE IN *IN RE AIR CRASH DISASTER AT LOCKERBIE, SCOTLAND*, IN SUPPORT OF PETITIONERS

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Questions Presented

1. Under the Warsaw Convention, must a parent, spouse, child or sibling demonstrate financial dependence on a decedent in order to recover damages for the loss of society he or she sustained?

2. Under Article 17 of the Warsaw Convention, Does "Damage Sustained" include loss of society?

3. Does the Death on the High Seas Act apply in a Warsaw Convention case?

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Consent of Parties

Both parties have consented to the filing of this amicus brief by letters that are filed herewith.

Interest of the Amicus Curiae

The plaintiffs' committee in *In re Lockerbie Air Disaster*, E.D.N.Y. (MDL 799), hereby submits this brief amicus curiae in support of the position of the petitioners that in Warsaw Convention[1] death cases, federal common law permits a decedent's survivor to recover for loss of society, whether or not that survivor was financially dependent on the decedent, and whether or not the accident occurred on the high seas.

Amicus Curiae's interest arises from the fact that there are still 150 Lockerbie cases pending where the loss of society damages suffered is an important component of the family's loss. Indeed, approximately 100 of the remaining cases are brought by parents for the deaths of their children (primarily college students), wherein parental loss of society is the primary element of the damages they sustained.

Statement of the Case as it Relates to the Lockerbie Litigation

It was in our *Lockerbie* litigation that the Second Circuit Court of Appeals first held that the Warsaw Convention cause of action was exclusive and that federal common law supplies its standard of damages. *In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991) (hereafter referred to as "*Lockerbie I*"). It was also in our case that the court of appeals first held that loss of society damages can only be recovered if the family member also suffered a loss of financial contributions. *In re Air Disaster at Lockerbie, Scotland*, 37 F.3d 804 (2d Cir.) (revised opinion, generally called "*Lockerbie II.*"), *cert. denied*, 115 S.Ct. 934 (1995).

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, entered into force in the United States on October 29, 1934. 49 Stat. 3000; 49 U.S.C.App. § 1502.

The Lockerbie litigation arose after Pan American World Airways Flight 103 exploded over Lockerbie, Scotland on December 21, 1988. Subsequently, over 200 wrongful death actions were brought by the victims' survivors, against Pan Am and its security subsidiary, Alert Management Systems, Inc. The Judicial Panel on Multidistrict Litigation consolidated those actions before Chief Judge Thomas C. Platt of the Eastern District of New York.

After over three years of discovery, a three month consolidated liability trial resulted in a jury finding that Pan Am's wilful misconduct was a proximate cause of the Flight 103 disaster. The District Court entered judgments after three exemplar damages trials in which loss of society damages were awarded. On appeal by Pan Am, a panel of the Second Circuit affirmed liability and allowed loss of society damages. In a modified opinion, the court limited such damages to cases of financial dependency. That decision was followed and amplified by the court of appeals in the instant case, below.

Summary of Argument

The decision of the court below in this case and in *Lockerbie II*, that damages for loss of society are limited to cases of financial dependency, is neither logical nor sensible. Financial dependency is irrelevant to the question of loss of society resulting from the death of a family member.

Even in General Maritime Law, no such distinction is warranted. Those admiralty cases that articulate such a rule base it on the need for uniformity with cases under federal statutes such as the Jones Act and Death on the High Seas Act, when this Court has explicitly denied that such a need exists. In any event, those statutes are applicable to admiralty only and are at diametric variance with the standard of the Warsaw Convention that "damage sustained" be awarded when wilful misconduct has been found. There is no need to

import the tortured law of admiralty into Warsaw Convention actions.

The language and drafting history of the Convention indicates an intent to permit a broad range of damages in accord with French civil law. Federal common law implementing the Warsaw Convention should reflect the intent of the convention's drafters and permit the recovery of non-pecuniary losses including loss of society.

Moreover, the primary reference for federal common law is state law. The vast majority of states allow for a recovery of loss of society damages, without reference to dependency. So do lower federal courts in civil rights actions. This Court's own General Maritime Law decisions have provided for loss of society recoveries in cases outside the ambit of the Death on the High Seas Act (DOHSA) and the Jones Act.

DOHSA, the Jones Act and the Federal Employer's Liability Act are inappropriate references for federal common law, particularly when construing the "damage sustained" language of the Warsaw Convention, because they apply to a narrow class of decedents and a limited geography.

The Death on the High Seas Act can not supply the governing law as to damages in any Warsaw Convention case. The Convention is federal law on a par with DOHSA and it preempts DOHSA when the two are in conflict, because the Convention was more recently enacted and more specifically addresses aviation accident cases.

Argument

I

DAMAGES FOR LOSS OF SOCIETY SHOULD NOT BE CONDITIONED ON PROOF OF DEPENDENCY

A. The Financial Dependency Standard is Irrelevant to Loss of Society Damages

The dependency condition articulated by the Second Circuit is illogical, particularly because Article 17 of the Warsaw Convention allows recovery of "damage sustained." A family member who has suffered a profound loss of society and companionship may have been financially dependent on the decedent, may have had no financial support at all, or may have been a financial provider to the decedent (e.g. a parent or working spouse). To condition legal recognition of a loss of society on proof that money flowed from one family member to another lacks any rational basis and imposes a harsh and arbitrary result on those who can not satisfy the irrelevant condition.

Even the Second Circuit court of appeals has admitted that loss of society is a matter that bears no relation to pecuniary loss. *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084, 1092 (2d Cir.), *cert. denied*, 114 S.Ct. 1060 (1994).

Placing this rule in a practical context best demonstrates its absurdity. Consider a loving but childless couple in which the husband earns a substantial income, such that the family hires employees to cook and clean and otherwise run the household, while the wife engages in charitable endeavors. If the wife were to suffer a wrongful death, a jury may very well conclude that the husband was not financially dependent on her, and notwithstanding their close relationship he could not recover loss of society under the dependency test established below.

Similarly, to the parents of college-age students who died on Pan Am Flight 103, the dependency requirement estab-

lished below lacks rationality. They face denial of loss of society damages, simply because their children did not live long enough to assist them financially in their old age.[2]

The harshness of this rule could be remedied by holding that loss of society is always recoverable for the death of a spouse, parent, or child, but this answer simply proves the point: the classification adopted below is irrational, unfair, and unrealistic. An opportunity to prove entitlement should be afforded to all with a close enough family relationship to the decedent to merit recognition of the loss as a matter of law.

Such was the holding recently by Judge Robinson in *Maikovich v. Korean Air Lines Co., Ltd.*, No. 83-3792 (D.D.C. November 14, 1994):

> [I]n the interest of uniformity, the Second Circuit has explicitly taken the position that damages under the Warsaw Convention shall be governed by general maritime law, which prohibits loss of society damages absent a showing of dependency. *Zicherman*.
>
> In prior opinions addressing loss of society damages, this Court has held that the Warsaw Convention permits recovery for loss of society, so long as a claimant presents sufficient evidence of a relationship with a decedent from which a jury could find that a loss of society has occurred. Although KAL, prior to the Second Circuit's opinion in *Zicherman*, argued that loss of society damages should be available to only the dependent of a decedent, this Court refused to impose such a limitation because of the Court's view that the intent of the drafters

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[2] The dependency rule is especially perverse in this situation because if there is any relationship between financial dependency and loss of society in a parent-child relationship, it is inverse. The loss of society is greatest when the child lives at home, but the parent is most likely to receive financial assistance from the child long after the child leaves home. Thus, the parents have no claim for loss of society when their loss of society would be greatest, but obtain a claim when their loss of society is less acute.

> of the Warsaw Convention was to provide broadly for damages sustained. In a similar vein, this Court declines to adopt the position taken by the Second Circuit in *Zicherman* that general maritime law governs the types of damages recoverable under the Warsaw Convention because such an approach, while adopted in part to foster the worthy goal of uniformity, fails to give adequate consideration to the intent of the drafters of the Convention or to the Convention's underlying purposes.

Slip. op. at 11-13.

B. Under the General Maritime Law, Loss of Society Damages are awarded without restriction based on dependency

Even under the General Maritime Law, it is not proper to limit loss of society damages to financial dependents.

In 1970, this Court recognized a wrongful death cause of action under the General Maritime Law. *Moragne v. States Marine Lines*, 398 U.S. 375 (1970). Subsequently, this Court held that loss of society damages are recoverable in *Moragne* actions, for longshoremen in territorial waters. *Sea-Land Services v. Gaudet*, 414 U.S. 573, 585-90 (1974). The *Gaudet* court placed great emphasis on consistency with prevailing state rules, regardless of any inconsistency with other federal maritime remedies. 414 U.S. at 587, 591.

Notwithstanding what appears to have been a clear statement by this Court in *Gaudet*, several lower federal courts have grafted a dependency condition upon it, reasoning that uniformity with the DOHSA and the Jones Act compel that result. *E.g. Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084, 1092 (2d Cir.), *cert. denied*, 114 S.Ct. 1060 (1994). That reasoning is inconsistent with this Court's decision in *Gaudet*, and with Congressional intent behind the DOHSA.

In *Gaudet*, this Court explicitly acknowledged that permitting a recovery for loss of society under the General Mar-

itime Law created an inconsistency with the law under the Death on the High Seas Act, but found that uniformity was obviously not Congress' intent:

> We recognize, of course, that our decision permits recovery of damages not generally available under the Death on the High Seas Act. Traditionally, however, "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963). The scope and content of the general maritime remedy for wrongful death established in Moragne is no exception. . . . . Congress' insistence that the [Death on the High Seas] Act not extend to territorial waters . . . indicates that Congress was not concerned that there be a uniform measure of damages for wrongful deaths occurring within admiralty's jurisdiction, for in many instances state wrongful-death statutes extending to territorial waters provided a more liberal measure of damages than the Death on the High Seas Act.

414 U.S. at 588 n. 22.

Several courts have recognized the error in attempting to impose uniformity upon a complex of laws that this Court has chosen to leave divergent. Most recently, in *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994), the Court of Appeals noted that this Court in *Gaudet* "recognized that it was permitting recovery for damages that were not compensable under the Death on the High Seas Act," 26 F.3d at 915, and noted that this Court also recognized and accepted non-uniformity in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), *Id.*, but nevertheless "left the law applicable to territorial-water *Moragne* actions where it found it." 26 F.3d at 916. Thus, the *Sutton* court found any reliance on a goal of uniformity to be neither commanded nor permitted by this Court's jurisprudence:

> We do not consider ourselves free to give such weight to the interest of uniformity in light of *Gaudet*'s explicit acknowledgment that it was creating a non-uniform cat-

> egory of damages in territorial waters and the acknowledgments of non-uniformity in *Higginbotham*. The fact that the death of a seaman in territorial waters leads to recovery only of pecuniary damages is dictated by statute . . . and that statute does not limit recoveries for the deaths of non-seamen.

26 F.3d at 917 (citations omitted).[3] *See also Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622, 636-37 (3d Cir. 1994) (noting that uniformity has not dictated this Court's prior holdings in maritime death actions), *cert. granted*, 63 U.S.L.W. 3644 (1995)

The *Sutton* court went on to hold:

> We decline, therefore, to limit Gaudet by drawing an unnecessary distinction between dependent and nondependent parent plaintiffs in Moragne actions for determining the availability of loss-of-society damages. As the Court noted in Moragne, "it better becomes the humane and liberal character of proceedings to admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." Moragne, 398 U.S. at 387, 90 S.Ct. at 1781 (quoting The Sea Gull, 21 F.Cas. 909, 910 (No. 12, 578) (C.C.Md.1865)). Any lack of uniformity that is evidenced by our ruling inheres in the decision of the Supreme Court in Gaudet and in the actions of Congress in enacting DOHSA and the Jones Act. We are in no position to disregard or modify either of those authorities, even if we were of such a mind. We therefore affirm the district court's award of loss-of-society damages without regard to dependency.

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[3] The *Sutton* court noted that the absence of a dependency requirement will not open up loss of society damages to any person who claims them, since in *Moragne* this Court instructed the lower courts to use DOHSA as a guide, 26 F.3d at 916, and federal courts have consequently followed the DOHSA beneficiary schedule to limit claims to the spouse, children, parents and dependent relatives of the deceased. *Id.*

26 F.3d at 917. *See also Randall v. Chevron USA, Inc.*, 13 F.3d. 888, 903 (5th Cir.) (stating, "In our view, the law of this circuit does not unequivocally limit recovery of loss of society damages for the wrongful death of a parent to children who are financially dependent on the deceased parent."), *cert. denied*, 115 S.Ct. 498 (1995).

In sum, the holding below misinterprets General Maritime Law. Perhaps more importantly, it disregards the compensatory purposes of the Warsaw Convention by unnecessarily borrowing from General Maritime Law an arbitrary and irrational restriction on recovery. That error is made apparent by examining more fundamental considerations in the development of federal common law under the Warsaw Convention.

II

"DAMAGE SUSTAINED" INCLUDES COMPENSATION FOR LOSS OF SOCIETY

A. The Language and Drafting History of the Convention Indicates an Intent to Permit a Broad Range of Damages in Accord with French civil law

The matter before this Court raises two subsidiary questions: what measure of damages does Article 17 of the Warsaw Convention permit, and what should federal common law, implementing Article 17, provide for?

There is virtual unanimity that Article 17 was intended to permit the broadest possible recovery of damages. The phrase "damage sustained" ("dommage survenu") in Article 17 rules out any argument that the Convention only allows a recovery for pecuniary damages. L. Goldhirsch, *The Warsaw Convention Annotated*, 58 (Nijhoff; Dordrecht 1988) (citing *Preston v. Hunting Air Transport*, 1 QB 454 (1956)).

Lower federal courts have regularly held that Article 17 allows a recovery of all elements of damage suffered by the survivors of an aircraft accident. *Lockerbie II*, 37 F.3d at 829;

In re Korean Air Lines Disaster, 932 F.2d 1475, 1485, 1487 (D.C. Cir.) (Article 17 permits compensation for "monetary or other loss to . . . survivors"), *cert. denied*, 502 U.S. 994 (1991); *Lockerbie I*, 928 F.2d at 1282, 1285-86 (Article 17 contemplates an award of "full compensatory damages", including 'moral damages' under civil law); *In re Air Crash Disaster at New Orleans*, 789 F.2d 1092 (5th Cir.) (affirming recovery for "loss of love and affection" under Louisiana law in Warsaw Convention action), *vacated on other grounds*, 490 U.S. 1032 (1989).

B. Federal Common Law Implementing the Warsaw Convention Should Reflect the Intent of the Convention's Drafters and Permit the Recovery of Non-Pecuniary Losses including Loss of Society.

The Convention's drafters left damages issues to the law of the forum court. Article 24(2). *In re Korean Air Lines Disaster*, 932 F.2d at 1488; *Lockerbie I*, 928 F.2d at 1283 (stating, "Commentators and case law are in accord that the Convention leaves the measure of damages to the internal law of parties to the Convention.").

Notwithstanding this, in articulating the internal law of the United States, the Court of Appeals for the Second Circuit was free to honor the Convention's goal of international uniformity. *See Lockerbie I*, 928 F.2d at 1278. The difficulty with the decision below lies in its misdefining the "uniformity" contemplated by the Warsaw Convention's drafters.

The drafters of the Warsaw Convention sought uniformity in air law on an international level. The Convention "was intended to serve as a uniform, international law." *Lockerbie I*, 928 F.2d at 1280 (citing *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 337-38 (5th Cir.), *cert. denied*, 392 U.S. 905 (1968)). The *Lockerbie I* court ruled that punitive damages were unavailable in Convention cases, at least in part because other nations follow that rule. 928 F.2d at 1287. *See also In re Korean Air Lines Disaster*, 932 F.2d at 1485, 1487. In *Eastern Air Lines, Inc. v. Floyd*, 499 U.S. 530 (1991) this Court expressly stated its intent to rule in accordance

with "the Warsaw Convention's stated purpose of achieving uniformity of rules governing claims arising from international air transportation." 499 U.S. at 552.

The uniformity sought by the court below was not the uniformity envisioned by the Convention's drafters, by this Court, or even by the earlier Second Circuit panel in *Lockerbie I*. The panel below sought to make damages law under the Convention consistent with United States federal common law in maritime cases, 43 F.3d at 21-23, but the drafters of the Convention clearly did not envision uniformity of that sort.[4]

The first reference below should have been to the Convention itself. *Compare Butler v. Aeromexico*, 774 F.2d 429, 431 (9th Cir. 1985) (district court's refusal to apply Alabama damages law in Convention death case was proper, because Alabama law only provided for punitive damages in death cases, and this conflicts with the compensatory tenor of the Convention.).

As this Court has noted previously, the terms of French civil law are critical in understanding the Convention. It was drafted in French by delegates from several civil law jurisdictions. *Air France v. Saks*, 470 U.S. 392, 399-400 (1985); *See also Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 536 (1991). Civil law awarded damages equivalent to loss of society and companionship for nearly a century before the Warsaw Convention was drafted. Tunc & McGregor, International Encyclopedia of Comparative Law, Vol. XI, Chapter 9 pp. 16-17 (moral damages, a survivor's loss of society and companionship, date back to 1833 in France, 1881 in Belgium,

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[4] The drafters could not have contemplated any issue arising out of the U.S. legal system, as no U.S. delegate was among them. The U.S. only sent observers. *Lockerbie I*, 928 F.2d at 1271.

In addition, when it ratified the Warsaw Convention in 1934, it would have been impossible for Congress to contemplate that General Maritime Law for death actions could be applied. There was no cause of action for wrongful death under the General Maritime Law until this Court decided *Moragne* in 1970.

and 1912 in Spain); *see also* G. Miller, *Liability in International Air Transport*, pp. 112-115 (Kluwer, The Netherlands 1977).

Professor George Ripert[5] explicitly noted during the drafting process that under French law, the survivors of decedents were entitled to moral as well as pecuniary damages. Cha, *The Air Carrier's Liability to Passengers in International Law*, 7 Air Law Review 26, 49-50. In *Floyd*, this Court acknowledged the recoverability of moral damages under French law. 499 U.S. at 539.

The law is not dissimilar in common law nations. The Australian Civil Aviation (Carrier's Liability) Act 1959-1973, Section 12(8), states that in Warsaw Convention death cases, "In awarding damages, the court or jury is not limited to the financial loss resulting from the death of the passenger." Similarly, in England the Fatal Accidents Act 1976, as amended, governs recoveries in Warsaw Convention death actions pursuant to the Carriage by Air Act 1961. It allows a limited claim for bereavement by the decedent's spouse or by parents in the case of unmarried decedents.

C. The Convention's General Intent to Limit the Carrier's Liability Does Not Apply to Cases Where There Has Been a Finding of Wilful Misconduct.

In both the instant case and the Lockerbie litigation, the Convention's general purpose of limiting carrier liability does not pertain. Unlike this Court's decisions in *Saks* and *Floyd*, both the instant case and *Lockerbie* involve jury findings of wilful misconduct by the carriers.[6] In such cases, the drafters

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[5] This Court has previously noted that Professor Ripert was a leading French delegate responsible for the drafting of the Warsaw Convention. *See Floyd*, 499 U.S. at 543 n. 9.

[6] *Saks* and *Floyd* involved an ear injury and emotional distress, respectively. Both were brought under the Montreal agreement in which carriers waived their "due care" defenses under Article 20 of the Convention. *See Floyd*, 499 U.S. at 552. Accordingly, not even negligence had been proven, let alone wilful misconduct. In *Floyd* this Court

of the Convention set out to deny the carriers any limitation or exclusion of liability:

> The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

Article 25(1).

The broad language of this article implicates more than the limits to carrier liability found in Article 22. Article 25(1) ensures that a carrier is fully liable for all harm that results from its wilful misconduct. *Compare In re Korean Air Lines Disaster*, 932 F.2d at 1493 (Mikva, dissenting in part, and stating that "the original language of Article 25 does not suggest that only Article 22 was covered . . ."). Thus, it would be improper to allow the Convention's general purpose of limiting liability to affect any formulation of the damages recoverable when wilful misconduct is proven.[7] That measure

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expressly stated that in light of the Convention's purpose of limiting carrier liability, it was reluctant to subject carriers to "*strict* liability for purely mental distress." 499 U.S. at 552 (emphasis supplied). These considerations have no bearing here.

[7] Wilful misconduct cases are rare. Excluding the instant case and *Lockerbie*, Amicus knows of only six aircraft disaster cases in the sixty one year history of the Warsaw Convention in which the carriers were found guilty of wilful misconduct. *See In re Air Crash in Bali, Indonesia*, 871 F.2d 812 (9th Cir.), *cert. denied*, 493 U.S. 917 (1989); *Butler v. Aeromexico*, 774 F.2d 429 (9th Cir. 1985); *Leroy v. Sabena World Airways*, 344 F.2d 266 (2d Cir.), *cert. denied*, 382 U.S. 878 (1965); *KLM v. Tuller*, 292 F.2d 775 (D.C.Cir.), *cert. denied*, 368 U.S. 921 (1961); *American Airlines v. Ulen*, 186 F.2d 259 (D.C. Cir. 1949). A judgment that has not been reported in a published opinion was entered on a jury finding of wilful misconduct in *In re Pago Pago Aircrash of January 30, 1974*, 419 F.Supp. 1158 (C.D. Cal. 1976).

Lower federal courts have not been hesitant to preclude wilful misconduct findings by pretrial motions, or to reverse them after trial, based on insufficiency of the evidence. *See Ospina v. Trans World Airlines*,

of damages must be as full and as complete as local law permits, consistent with the intent of the drafters of the Convention.[8]

D. Even as a Strict Federal Common Law Matter, The Proper Rule is to Allow Loss of Society

1. Federal Common Law Must Reflect Modern Trends and Standards Set Forth in State Law.

The court below stated that "federal maritime law supplies the measure of damages for injuries arising out of accidents governed by the Warsaw Convention." *Zicherman v. Korean Air Lines Co., Ltd.*, 43 F.3d 18, 23 (2d Cir. 1994). This reference to one exclusive source is not a proper formulation of federal common law, in any context. In particular, the borrowing from admiralty law of a dependency requirement for loss of society damages is inconsistent with the broad compensatory intent of Article 17 of the Convention.

In *Consolidated Rail Corp. v. Gotshall*, 114 S.Ct. 2396 (1994), this Court recognized a FELA cause of action for negligent infliction of emotional distress. Concurring, Justice Souter noted that in developing federal common law for FELA cases, this Court must be:

> informed by reference to the evolving common law. As we have explained:

Inc., 975 F.2d 35 (2d Cir.) (reversing judgment in accordance with finding of wilful misconduct), *cert. denied*, 113 S.Ct. 1944 (1993); *Confeccoes Texteis de Vouzela, LDA v. Space Tech Systems Inc.*, 972 F.2d 1338 (Table: Text at 1992 WL 170964) (9th Cir. 1992) (affirming District Court's granting of summary judgment for defendant).

[8] Especially in death cases, the elements of damages recoverable under Article 17 will have practical importance only when a carrier has been adjudged liable for wilful misconduct under Article 25. This Court has already noted that even when the Convention was adopted, the monetary cap was low. *Floyd*, 499 U.S. at 546. Today, the $75,000 cap set in the Montreal Agreement limits a carrier's liability to an amount far below even a strict peculiarly loss recovery for wrongful death.

> [I]nstead of a detailed statute codifying common law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. But it is clear that the general congressional intent was to provide liberal recovery for injured workers . . . and it is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet the changing conditions and changing concepts of industry's duty toward its workers. *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958).

114 S.Ct. at 2412.

Justice Souter's comment has as much application to Warsaw Convention jurisprudence as it does to FELA Like FELA, the Convention is written in "general terms," and thus leaves to courts the duty of fashioning remedies in a manner analogous to common law.[9] The primary reference to common law that this Court turned to in *Gotshall* was state common law. 114 S.Ct. at 2405-08. In addressing loss of society damages under the Warsaw Convention, the development of the common law by state legislatures and courts should similarly guide the federal courts.

In one of the first decisions addressing the substance of federal common law under the Warsaw Convention, Judge Weinstein placed primary and substantial reliance on the clear consensus formed by state laws. *In re Inflight Explosion on Trans World Airlines, Inc. Aircraft*, 778 F. Supp. 625, 631-32 (E.D.N.Y. 1991), *rev'd on other grounds sub nom Ospina v. Trans World Airlines, Inc.*, 975 F.3d 35 (2d Cir.) , *cert. denied*, 113 S.Ct. 1944 (1993).

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[9] However, F.E.L.A. is not a good substantive reference for Warsaw Convention cases because it is limited to actions for death or injury to employees. Therefore, Congress clearly did not anticipate its application to a broad range of victims, including children.

Judge Weinstein reasoned:

> If possible, federal common law tort jurisprudence should be consistent with that developed by the states. . . . The federal courts . . . . need not reinvent an old wheel.

778 F. Supp. at 632. Indeed, this Court has consistently referred to state law in developing General Maritime Law. *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990); *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986); *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980).

2. Recognition of a Loss of Society Claim Under the Warsaw Convention is the Only Fair Result in Light of the Overwhelming Majority of States Which Provide for Such a Recovery

Forty four states provide damages in death actions for the loss of a decedent's society or companionship, or for similar damages such as loss of spousal consortium.[10] One recent

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[10] Alaska, Alaska Stat. § 09.55.580(c)(4) (for decedents survived by spouse, children or other dependent survivors, death damages include those for loss of consortium); *Gillispie v. Beta Construction Co.*, 842 P.2d 1272 (Alaska 1992) (parents have loss of society claim for death of child under Alaska Stat. § 9.15.010).

Arizona, *City of Tuscon v. Wondergem*, 466 P.2d 383, 387 (Az. 1970) (damages under death statute include recovery for loss of companionship, comfort and guidance).

Arkansas, Ark.Stat.Ann. § 16-62-102(f) (damages for pecuniary loss include spousal loss of companionship).

California, *Fox v. Pacific Southwest Airlines*, 184 Cal.Rptr. 87, 89 (Cal. App. 1982) (plaintiffs may recover the pecuniary value of such factors as lost comfort, society, companionship, care and protection).

Colorado, Colo. Rev. Stat. § 13-21-203 (damages include noneconomic losses including grief and loss of companionship).

Connecticut, Conn. Gen. Stat. § 52-555a (creating spousal claim for loss of consortium in addition to general loss to estate death statute at Conn. Gen. Stat. § 52-555).

(*Footnote continued*)

commentary on this issue identified no state law statute or holding which conditions an award of loss of society on proof

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Delaware, Del. Code Ann. § 3724(d)(5) (no loss of society but mental anguish is allowed).

Florida, Fla. Stat. Ann. § 768.21 (spouse and minor children may recover for loss of companionship and mental pain and suffering, and parents of deceased minor children or single adult children may recover for mental pain and suffering).

Hawaii, H.R.S. § 663-3 (death damages include lose of love and affection, loss of society, companionship, comfort and consortium suffered by spouse, children or parents of deceased).

Idaho, *Volk v. Baldazo*, 651 P.2d 11 (Idaho 1982) (parents may claim for loss of comfort, society and companionship of deceased child).

Illinois, *Hall v. Gillins*, 147 N.E.2d 352 (Ill. 1958) (pecuniary losses under statute include loss of companionship, love and affection).

Indiana, *State v. Bouras*, 423 N.E.2d 741, 746 (In. App. 1981) (loss of care, love and affection recoverable by widow, dependent children or dependent next of kin).

Iowa, *Haafke v. Mitchell*, 347 N.W.2d 381, 389 (Iowa 1984) (claim for loss of society, care and attention of spouse or parent); *Audobon-Exira Ready Mix, Inc. v. Illinois Central Gulf R.R. Co.*, 335 N.W.2d 148, 150 (Iowa 1983) (parent's loss of services, companionship and society of child recoverable under Civil Rule).

Kansas, Kan. Stat. Ann. § 60-1903, 1904 (damages are recoverable for loss of society, companionship, comfort and protection and other non-pecuniary losses, capped at $100,000 per case).

Kentucky, Ky. Rev. Stat. Ann. §§ 411.135, 145 (parents may recover for loss of affection and companionship of minor and spouses may recover for loss of consortium, including loss of society and companionship).

Louisiana, La. Civ. Code Ann. art. 2315 (damages may include loss of consortium, service and society).

Maine, Me. Rev. Stat. Ann. title 18-A, § 2-804 (death damages include up to $75,000 for loss of comfort, companionship and society).

Maryland, Md. Cts. & Jud. Proc. Code Ann. § 3-904 (loss of society and companionship available to plaintiffs who survive a spouse, a child under 21, a parent of a minor child, or an unmarried dependent adult child).

Massachusetts, G.L. c. 229, § 2 (survivors entitled to compensation for loss of services, protection, care, assistance, society, companionship, comfort, guidance).

(*Footnote continued*)

of financial dependency. Annot., *Recovery of Damages for Loss of Consortium Resulting from Death of Child-Modern*

Michigan, Mich. Comp. Laws Ann. § 600.2922(6) (loss of society and companionship available in all cases).

Minnesota, *Steinbrecher v. McLeod Coop. Power Ass'n.*, 392 N.W.2d 709 (Minn. App. 1976) (all beneficiaries are entitled to recover for loss of society, comfort, and consortium).

Mississippi, Miss. Code Ann. § 11-7-13 (parties shall recover "all damages of every kind"); *Motorola Communications and Electronics, Inc. v. Wilkerson*, 555 So.2d 713 (Miss. 1989) (adult daughter awarded compensation for loss of society of elderly father).

Missouri, Mo. Ann. Stat. § 537.090 (damages include value of lost consortium and companionship).

Montana, *Matter of Farnum*, 730 P.2d 391 (Mont. 1986); *Swanson v. Champion Intn'l Corp.*, 646 P.2d 1166 (Mont. 1982) (loss of spousal consortium); *Johnson v. Supersave Markets, Inc.*, 686 P.2d 209 (Mont. 1984) (grief or mental distress).

Nebraska, *Williams v. Monarch Transportation, Inc.*, 470 N.W.2d 751 (Neb. 1991) (parents have claim for pecuniary value of lost society, comfort and companionship of adult daughter).

Nevada, Nev. Rev. Stat. § 41.085 (damages include those for survivor's grief or sorrow and loss of companionship, society and consortium).

New Jersey, *Carey v. Lovett*, 622 A.2d 1279 (N.J. 1993) (parent entitled to pecuniary value of child's companionship).

New Mexico, *Romero v. Byers*, 872 P.2d 840 (N.M. 1994) (recognizing spousal common law claim for loss of consortium in case of death).

North Carolina, *Carver v. Carver*, 314 S.E.2d 739, 747 (N.C. 1984) (parent may recover for loss of child's society, companionship, comfort, etc. under N.C.Gen. Stat. § 28A-18-2(b)(4)b.)

North Dakota, *Hopkins v. McBane*, 427 N.W.2d 85, 90 (N.D. 1988) (parent may recover for loss of child's society, comfort and companionship).

Ohio, O.R.C. 2125.02(B) (surviving spouse, minor children, parents or next of kin may recover loss of society, including companionship, consortium, and care).

Oklahoma, Okla. Stat. Ann title 12, § 1053(B) (damages recoverable include spouse's loss of consortium and children's and parents' grief and loss of companionship).

Oregon, Or. Rev. Stat. § 30.020 (spouse, children and parents of decedent may recover for loss of society and companionship).

(*Footnote continued*)

Status, 77 A.L.R.4th 411 (1990). *But see Masunaga v. Gapasin*, 790 P.2d 171 (Wash. App.) (loss of love and companionship of children is permitted, but only where monetary dependency is shown), *review denied*, 798 P.2d 780 (Wash. 1990).

The trend toward recognition of loss of society damages has been fueled by judicial distaste for the undesirable consequences that result from a strict pecuniary loss rule, where the younger the victim, the cheaper it will be to kill than to injure.[11] Numerous state courts have overruled precedent bar-

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Pennsylvania, *Walton v. Avco Corp.*, 21 Av. Cas. (CCH) 18,340 (Pa. Super. 1989); *Mikula v. Harrisburg Polyclinic Hosp.*, 58 Pa. D. & C.2d 125 (1972) (loss of parental or spousal society and comfort).

South Carolina, *Self v. Goodrich*, 387 S.E.2d 713 (S.C. App. 1989) (parent has claim for loss of society and companionship for death of infant).

South Dakota, *Flagtwet v. Smith*, 367 N.W.2d 188 (S.D. 1985) (all survivors including parents have claim for loss of companionship and society of child).

Texas, *Moore v. Lillebo*, 722 S.W.2d 683 (Texas 1986) (loss of society and companionship).

Utah, *Allen v. United States*, 588 F. Supp 247, 444 (C.D. Utah 1984) (loss of society and companionship).

Vermont, Vt. Stat. Ann. title 14, § 1492 (loss of love and companionship of a minor child is recoverable as a pecuniary loss).

Virginia, *Breeding v. Johnson*, 159 S.E.2d 836 (Va. 1968) (father may recover for loss of child's care, attention and society).

Washington, *Masunaga v. Gapasin*, 790 P.2d 171 (Wash. App.) (loss of love and companionship of children is permitted, but only where monetary dependency is shown), *review denied*, 798 P.2d 780 (Wash. 1990).

West Virginia, W. Va. Code § 55-7-6 (damages for sorrow, mental anguish and solace including society, companionship, and comfort).

Wisconsin, *Chang v. State Farm Mut. Auto Ins. Co.*, 514 N.W.2d 399 (Wis. 1994) (parent has claim for loss of society and companionship of child); Wis. Stat. Ann. § 895.04 (damages for loss of society and companionship of decedent's spouse, children or parents may be awarded up to $150,000).

Wyoming, Wyo. Stat. § 1-38-102 (damages for loss of society and comfort).

[11] This is so because the younger the victim, the less likely it is that he or she has dependents, and the more difficult it is to prove his or

ring a recovery for loss of society in actions for the death of a minor, to address this disturbing situation. *E.g. Hopkins v. McBane*, 427 N.W.2d 85, 90 (N.D. 1988) (stating, "That this barbarous concept of the pecuniary loss to a parent from the death of his child should control our decisions today is a reproach to justice," *quoting Wycko v. Gnodtke*, 105 N.W.2d 118, 121 (Mich. 1960)).

That forty four states allow loss of society recoveries actually understates the virtual unanimity on the issue, because in several states a wrongful death recovery is not meant to compensate survivors for their losses, but rather, provides recovery to the decedent's estate for the decedent's lost opportunity to accumulate wealth and enjoy life.[12] Under this method, the loss of society question simply does not present itself, and the death of a child will not dictate a disturbingly minimal award of damages to the parents.

Because recovery of loss of society is the overwhelming majority rule under state laws, and because the Convention's liability limitation purpose is inoperative in wilful misconduct cases such as this, it would be improper to utilize the Convention as a basis for denying any plaintiff a loss of society recovery under the rubric of federal common law. Especially since the reference used below (General Maritime Law under *Moragne*) did not even exist when Congress ratified the Convention, there can be no argument that the Convention's drafters or Congress intended the Convention to be used to constrain the recoveries of plaintiffs.

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her prospects for prospering and supporting others. By contrast, the greater the youth of the victim, the greater his or her life expectancy and the greater the cost of treating and caring for him or her and compensating for impairments over that period of time.

[12] Eleven states—Alaska, Connecticut, Florida, Georgia, Hawaii, Kentucky, Massachusetts, Oregon, Pennsylvania, Rhode Island, and Tennessee—award death damages based on the loss to the estate of the decedent, or have "hybrid" statutes with this component. 2 Kreindler, Aviation Accident Law § 13.02[2] at 13-11 (Bender 1994).

3. A Proper Weighing of Federal Statutes Also Dictates the Conclusion that Loss of Society Damages Are Recoverable Under the Warsaw Convention.

The overwhelming consensus in favor of allowing loss of society damages under state laws should complete inquiry into the loss of society question, there being no controlling or compelling dictate from Congress to reject state law. However, to the extent this Court consults federal statutory analogues, none of them compel a different result.

In *In re Inflight Explosion on Trans World Airlines, Inc. Aircraft*, one of the first cases to apply the new federal common law rule in *Lockerbie I*, the court consulted caselaw under various federal statutes. 778 F. Supp. at 632-35.[13] Each of these statutes is evaluated here for its worth as a guidepost in applying the Warsaw Convention cause of action.

(a) Civil Rights Actions for Wrongful Death Provide a Superior Reference for Federal Common Law Under the Warsaw Convention and Regularly Permit Recovery of Loss of Society Damages by All Who Suffer Them.

42 U.S.C. § 1983 (the Ku Klux Klan Act of 1871), states that any person who under color of state law deprives another citizen of any right, privilege or immunity secured by the Constitution "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." In *Carey v. Piphus*, 435 U.S. 247 (1978), this Court held that

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[13] The statutes were: the Federal Employer's Liability Act, 45 U.S.C. § 51 *et seq.* (F.E.L.A.), the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.*, the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, the Jones Act, 46 U.S.C.App. § 688 *et seq.*, the Civil Rights Act, 42 U.S.C. § 1983, the Death on the High Seas Act, 46 U.S.C.App. § 761 *et seq.*, ("DOHSA"), and General Maritime Law.

Section 1983 provides for an award of damages that will compensate for actual harm suffered. This Court commanded federal courts to fashion remedies by first referring to the general common law of torts and adapting that law, when necessary, "to provide fair compensation for injuries caused by the deprivation of a constitutional right." 435 U.S. at 258.

The mandate of this Court in *Piphus* is much like the one before this Court today (especially since the defendant has been found guilty of wilful misconduct)—to develop a federal common law that provides victims of international aviation accidents with fair and complete compensation for their injuries. In fulfilling that mandate under Section 1983, courts of appeals have faced the question of whether survivors of the deceased recover for their loss of society, and their answer has been positive. *Berry v. City of Muskogee*, 900 F.2d 1489, 1506-07 (10th Cir. 1990); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1251-53 (7th Cir. 1984) (loss of society damages awarded to parent of decedent); *Kelson v. City of Springfield*, 767 F.2d 651, 653-55 (9th Cir. 1985).[14]

Because federal common law in civil rights actions provides for damages to all survivors for loss of society, similar awards should be permitted under the Convention.

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[14] Other courts of appeals have authorized loss of society recoveries by survivors, under the law of the state where the wrongful death occurred. *E.g Rhyne v. Henderson County*, 973 F.2d 386, 390-91 (5th Cir. 1992).

Courts in the following cases have also awarded loss of society damages to the parents of persons who were unconstitutionally deprived of their lives. *Sharpe v. City of Lewisberg*, 677 F. Supp. 1362, 1368-69 (M.D. Tenn. 1988); *Doty v. Carey*, 626 F. Supp. 359, 363-64 (N.D. Ill. 1986).

(b) The Jones Act, Federal Employer's Liability Act and Longshoreman's Act are Inappropriate References for Warsaw Convention Cases, while Congress' Command in the Federal Tort Claims Act to Refer to State Laws is Instructive

The Federal Employers Liability Act, the Jones Act and the Longshoreman's Act do not provide appropriate references in fashioning a common law rule regarding loss of society damages for airline passengers in Warsaw Convention cases. These statutes protect a narrow class of persons—namely, employees. Congress could not have contemplated that the measure of damages for those decedents would govern actions for the deaths of airline passengers—a diverse group that typically includes children. The prototypical FELA/Jones/Longshoreman's Act decedent was and is a married male with dependents.

The records of this Amicus reveal that Pan Am Flight 103 carried over 100 young adults, many of them college students, who left parents surviving them. In formulating a rule that will apply to their cases, it is more appropriate to refer to general sources of wrongful death law. State law provides that source.

Indeed, in *In re Inflight Explosion of Trans World Airlines*, Judge Weinstein noted that the FTCA, which adopts state law as a measure of damages, is a better reference for the Warsaw Convention than the FELA, because it "has a broader sweep than the FELA, since it covers all possible plaintiffs rather than employees alone." 778 F. Supp. at 633.

(c) The Death on the High Seas Act Was Hastily Enacted to Fill a Gap in Federal Law and Is Not a Well-Considered Reference for Warsaw Convention Cases

Leaving aside whether DOHSA applies to this occurrence because flight 007 crashed into the high seas,[15] DOHSA can

[15] See Point III of this Brief.

and should not dictate any result under federal common law in a Warsaw Convention case. *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 280-84 (1980) (outside their ambit, DOHSA and the Jones Act do not preclude a finding that the federal common law provides a remedy for loss of society).

This Court noted in *Alvez* that DOHSA and the Jones Act "should not be accorded overwhelming analogical weight in formulating remedies under general maritime law" because they were hastily enacted within days of each other yet are "hopelessly inconsistent" and not the product of "attentive legislative review." 446 U.S. at 282-83. The Warsaw Convention, by contrast, was the product of years of debate among the drafters of the Convention and several more years of debate before its ratification in 1934 by the United States Senate.

Moreover, although DOHSA is not limited to seamen, its limited geographic scope makes it a poor reference for Warsaw Convention cases for the same reason that the Jones Act and FELA are not instructive. Unlike passenger airliners, the class of people on the high seas is generally limited to adults—seamen and cruise ship passengers. DOHSA cannot be instructive on the loss of society issue when the death of children is a major consideration.

III

THE DEATH ON THE HIGH SEAS ACT DOES NOT SUPPLY THE GOVERNING LAW AS TO DAMAGES IN ANY WARSAW CONVENTION CASE.

The Warsaw Convention is a treaty, and therefore the supreme law of the land, U.S. Constitution, Article IV, Clause 2, equal in stature and force to the domestic laws of the United States. *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 533 (1987);

Sulewski v. Federal Express Corp., 933 F.2d 180, 182 (2d Cir. 1991).

General rules of statutory construction apply to treaties. *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991). When a treaty conflicts with the terms of a previously enacted statute, the treaty prevails. *In re Aircrash in Bali, Indonesia*, 684 F.2d 1301, 1309 (9th Cir. 1982); *In re Erato*, 2 F.3d 11, 15 (2d Cir. 1993). Even when a Congressional enactment follows ratification of a treaty, if the two come in conflict the treaty must prevail unless Congress has made clear its intent to abrogate. *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1146 (3d Cir.) (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-23 (1963)), *cert. denied*, 493 U.S. 944 (1989); *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 936-37 (D.C.Cir. 1988) (citing *Cook v. United States*, 288 U.S. 102 (1933)). This flows from the fact that a treaty is a matter of international law and governs our relationships with other countries.

Finally, if a treaty addresses a legal question more specifically than an inconsistent general statute, the treaty governs. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987).

These principles dictate the conclusion that notwithstanding anything in DOHSA, plaintiffs are entitled to state a claim under the Warsaw Convention and receive compensation in accordance with federal common law that is consistent with the Convention's purposes. *In re Korean Air Lines Disaster*, 814 F.Supp. 592, 597 (E.D. Mich. 1993). Warsaw is both a more recent enactment than DOHSA and a more specific act by Congress governing death actions from aviation accidents. The argument that DOHSA applies here can only be made because its terms are so general.

The Warsaw Convention must govern here because there is a fundamental inconsistency between both the liability and damages standards of the two acts. On damages, DOHSA pro-

vides only for "pecuniary loss," 46 App. U.S.C. § 762, whereas Warsaw allows all "damage sustained." Article 17. "Damage sustained" and "pecuniary loss" are two different things. With respect to liability, DOHSA was hastily enacted to fill a gap in the law and provide a minimal, negligence-based recovery for those who otherwise would have received nothing, while the Convention established a two-tiered damages structure under Article 22, which capped damages unless wilful misconduct is found under Article 25. Therefore, Warsaw requires that carriers pay all damage sustained in case of wilful misconduct. To insert the DOHSA damages standard into the Warsaw Convention when wilful misconduct is proven would be improper.

In addition, the court below correctly noted that application of DOHSA to accidents on the high seas would make uniformity in aviation accident cases impossible. 43 F.3d at 21. For that additional reason, DOHSA standards should not govern here.

Conclusion

Amicus Curiae respectfully submits that the court of appeals below was correct in finding that loss of society damages are recoverable under the Warsaw Convention, but erred in imposing a financial dependency requirement on that recovery. In developing the federal common law, state laws are the primary reference. The dependency rule followed by a few lower federal courts, but by no means all of them, in General Maritime Law cases, is neither controlling nor sensible, even in the context in which it was developed. The dependency requirement is especially inconsistent with the intent of the drafters of the Warsaw Convention to permit a recovery for all damage sustained in cases where wilful misconduct has been proven.

The Death on the High Seas Act cannot provide the measure of damages in Warsaw Convention cases. DOHSA was a stopgap measure. It has limited geographic scope and would

defeat the Convention's goal of uniformity if imposed in aviation accident cases that happen to occur over the high seas.

Respectfully submitted,

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